

1 JOHN D. MUNDING
2 CRUMB & MUNDING, P.S.
3 601 W. Riverside, Suite 1950
4 Spokane, WA 99201
5 Telephone: (509) 624-6464
6 Fax: (509) 624-6155
7 Email: munding@crumb-munding.com

JUDGE WILLIAMS

8 UNITED STATES BANKRUPTCY COURT
9 EASTERN DISTRICT OF WASHINGTON

10 THE CATHOLIC BISHOP OF
11 SPOKANE a/k/a THE CATHOLIC
12 DIOCESE OF SPOKANE,

Debtor.

NO. 04-08822-PCW11
Chapter 11

13 COMMITTEE OF TORT LITIGANTS,

Plaintiff,

Adversary No. 05-80038-PCW

15 Vs.

16 THE CATHOLIC DIOCESE OF
17 SPOKANE, et al.,

Defendants.

ST. MARY PRESENTATION
PARISH – DEER PARK'S
OPPOSITION TO
SUMMARY JUDGMENT

19 St. Mary Presentation Parish – Deer Park and its Parishioners ("St. Mary
20 Presentation"), in opposition to the Tort Litigant Committee's (the "Committee") Motion for
21 Summary Judgment (Docket Nos. 63-67, 72), submits the following memorandum of law.
22 This memorandum incorporates and is supported by the Affidavit of Fr. Albert Grasher,
23 Declaration of Margaret McLean, Parishioner, and Defendants' Omnibus Statement of
24 Facts (LR 7056). St. Mary Presentation also adopts and incorporates those Affidavits filed
25 by other Defendants opposing Plaintiff's Motion.
26

ST. MARY PRESENTATION PARISH'S OPPOSITION
TO SUMMARY JUDGMENT - 1

CRUMB & MUNDING, P.S.
SUITE 1950
601 W. RIVERSIDE AVENUE
SPOKANE, WA 99201
(509) 624-6464
FAX (509) 624-6155

I.

RELIEF REQUESTED

The Committee's attempt to deny St. Mary Presentation its ownership interest in real property that St. Mary Presentation paid for, improved, and uses in fulfillment of its religious tenets must be rejected. The undisputed evidence demonstrates that:

1. Neither the Committee, its members, nor the Debtor have any beneficial interest in the real property belonging to St. Mary Presentation;

2. Neither the Committee, its members, nor the Debtor have a legal basis to justify the taking of real property from St. Mary Presentation, a non-debtor; and

3. St. Mary Presentation's equitable and beneficial ownership interest in the real property is clearly established by non-bankruptcy law.

As a matter of both law and fact, the Committee's Motion for Summary Judgment/Declaratory Relief seeking to deprive St. Mary Presentation of fundamental property rights and religious freedoms must be denied.

II.

PROCEDURAL HISTORY

A. The Bankruptcy

A voluntary petition under Chapter 11 of the Bankruptcy Code was filed by the Catholic Diocese of Spokane, a corporation sole ("Debtor"), on December 6, 2004 (Petition Date). The Bankruptcy Court entered the Order for Relief, adjudicating the Diocese a Chapter 11 Debtor. Since that date, the Debtor has acted as the Debtor-in-Possession pursuant to 11 USC 1108. The Debtor duly filed and subsequently amended its Schedules and Statement of Financial Affairs. (See Main Case Docket Nos. 19, 41-42)

Within its Statement of Financial Affairs, the Debtor describes certain real property to which it holds "bare legal title." The Statement of Affairs explains that equitable/beneficial title to such real property is held by other entities, including St. Mary Presentation. This description is accurate concerning the true ownership of the real property and supported by both facts and applicable law. Neither the Debtor nor St. Mary Presentation disputes this particular trust relationship.

1 **B. Appointment of Creditors Committee**

2 On February 2, 2005, the Court entered an Order duly approving the appointment of
3 the Committee. (Main Case Docket No. 206) The Committee consists of individuals who
4 filed complaints against the Diocese in the Superior Court of the County of Spokane, State
5 of Washington. Neither the Committee nor its members have asserted a claim in State
6 Court against St. Mary Presentation or identified any legal relationship with St. Mary
7 Presentation.

8 The legal standing of the Committee to seek declaratory relief against non-debtors in
9 this manner is disputed and the subject of a pending motion to dismiss. (See Section II.F.)

10 **C. The Adversary**

11 On February 4, 2005, the Committee filed a three count Complaint ("Complaint") in
12 this adversary proceeding ("Adversary Proceeding"), specifically:

- 13 • FIRST CAUSE OF ACTION
(Declaratory Relief: The Disputed Real Property)
- 14 • SECOND CAUSE OF ACTION
(Declaratory Relief: the Disputed Personal Property)
- 15 • THIRD CAUSE OF ACTION
(Declaratory relief: Substantive Consolidation)
16 (Docket No. 1, Complaint)
17
18

19 Although property is allegedly "disputed," the Committee does not have or assert a
20 legal claim to or legal interest in the real or personal property. (See Complaint, pp. 13-15.)

21 The relief sought by the Committee is drafted as equitable, although it is clearly of
22 the nature and effect of relief determining property rights of non-debtors. Specifically,

- 23 1. Declaring that the Disputed Real Property is property of the estate under 11
24 U.S.C. § 541(a)(1) as of December 6, 2004;
- 25 2. Declaring that the Disputed Personal Property is property of the estate under
26 11 U.S.C. § 541(a)(1) as of December 6, 2004;

1 3. Ordering the Debtor to amend its Amended Statement of Financial Affairs and
2 its Amended Schedules of Assets and Liabilities to reflect that the Disputed Real Property
3 and the Disputed Personal Property are all property of the estate;

4 4. Ordering substantive consolidation, nunc pro tunc, of the Debtor's bankruptcy
5 estate with the [Diocese-Related Entities] effective as of December 6, 2004.

6 (Adv Complaint, p. 15)

7 By way of the Complaint, the Committee seeks to determine the property rights and
8 interests of not only St. Mary Presentation, but of 82 non-debtors. The Complaint seeks to
9 deprive those non-debtors of their instrumentalities used in religious worship, faithful
10 exercise of its mission, activities, and ministries.

11 **D. Motion for Avoidance Powers**

12 On February 7, 2004, the Committee filed a motion in the main case seeking
13 avoidance powers. (Main Case Docket Nos. 223-224) The motion was heard on May 2,
14 2005. The court continued hearing on this matter for an indefinite period (approximately 5
15 to 6 months) with any counsel being able to renote this matter on 20 days notice.
16 (Main Case Docket No. 393)

17 **E. Motion for Summary Judgment**

18 The Committee filed the present motion for summary judgment ("Motion") on April
19 17, 2005. (Adv. Docket No. 63)

20 The Motion seeks specific relief defining title and ownership of at least 22 separate
21 parcels of real property which belong to at least 22 different and distinct Defendants.
22 Although the Committee's Motion indicates that they have restricted summary judgment to
23 their first cause of action, the Memorandum aggressively seeks a ruling on their third cause
24 of action by way of an "alter ego" argument.

25 The Committee's Motion attempts to "lump" St. Mary Presentation's real property
26 with other Defendants' real property interests, dealing with all parcels of property
collectively, including all improvements and fixtures. However, each parcel of real property
is a separate parcel of property, with separate and distinct ownership interest, and separate

1 factual circumstances surrounding each parcel's acquisition, improvement, maintenance,
2 and use. The committee's standardized factual scenario is inapplicable and not an
3 appropriate basis for declaratory relief against St. Mary Presentation.

4 **F. Motion to Dismiss Adversary Proceeding**

5 On May 2, 2005, the Parish Defendants filed a motion under FRBP 7012 seeking to
6 dismiss this Adversary Proceeding on the following grounds:

7 The Committee's Complaint should be dismissed on either of two (2)
8 separate grounds.

9 1. Nothing contained within the express language of Section
10 521(1) or 541(a) clearly, explicitly, or unambiguously confers standing to a
creditors committee to file suit against non-debtors to define a non-debtor's
property rights.

11 2. The Bankruptcy Court and Federal District Court lack subject
12 matter jurisdiction over the claims alleged in the Committee's Complaint
13 because there is no case or controversy between the Committee and the
Parishes within the meaning of the Declaratory Judgment Act and Article III of
the U.S. Constitution.

14 (Docket Nos. 99-100)

15 This motion is set to be heard on June 27, 2005.

17 **III.**

18 **NON-CORE PROCEEDING**

19 The Committee asserts in its Complaint that this is a "core proceeding" under 28
20 USC § 157(b) and 1334(b). The Parishes, based upon the declaratory nature of the relief
21 sought in the Complaint, deny that this is a core proceeding. This action exclusively seeks
22 declaratory relief against over 80 non-debtor defendants to determine the property rights of
23 separate legal entities. The Complaint does not present a federal question nor is there
diversity between the litigants.

24 The present adversary action has the effect of a defacto quiet title action as to non-
25 debtor defendants. As such, it could have easily been brought in state Superior Court
26 pursuant to RCW 7.28.010 et seq., regardless of whether the Debtor was in bankruptcy.

1 For purposes of this Adversary Proceeding, St. Mary Presentation does not consent
2 to entry of Findings of Fact and Conclusions of Law and does not waive defenses related to
3 Plaintiff's standing and failure to state a claim. (See Docket Nos. 88, 99-100.)

4 IV.

5 STATEMENT OF FACTS

6 St. Mary Presentation is a separate and distinct legal entity under Canon Law known
7 as a juridic person. [Canons §113-115, §515] Under Civil Law, St. Mary Presentation is an
8 unincorporated association. (Committee's Statement of Undisputed Fact, No. 23)

9 The Committee has questioned St. Mary Presentation's ownership of real property.
10 Specifically, that real property which was acquired by St. Mary Presentation on March 3,
11 1962, December 8, 1981, April 18, 2003 (Stang Aff. Ex. 1 – St. Mary Presentation) Contrary
12 to the Committee's assertion, St. Mary Presentation has been an owner of real property
since 1911, prior to the existence of the Debtor.

13 The present site of the church, parish hall, and parish offices (the church "campus")
14 encompasses the west half of a small block in a residential area of the City of Deer Park,
15 Washington. The campus runs approximately 300 feet north to south, and 150 feet east to
16 west, and is bounded by Main Street on the west, 4th Street on the north, and 3rd Street on
17 the south. The existing campus is made up of four separate parcels, which were acquired
over a period of 70 years. (Aff. A. Grasher, ¶ 10)

18 Historical records indicate that a portion of this property described as " The
19 Northwest quarter (N.W.1/4) of Block four (4) seventy five (75) feet by one hundred and
20 forty five (145) feet in the Original Townsite of Deer Park Washington" was given by
21 statutory warranty deed to "The Corporation of the Catholic Bishop of Nisqually in the
22 Territory of Washington" on November 8, 1911, by Joseph Reuthinger, Sr. This parcel,
23 which appears to refer to the northernmost quarter of the current church campus, does not
24 appear to have been included as one of the exhibits in support of the pending motion for
summary judgment. (Aff. A. Grasher, ¶ 11)

1 From the historical records maintained by the parish, including retrospective
2 newspaper articles and historical summaries, Mass was celebrated for the first time in the
3 newly-completed concrete block church on Easter Sunday, April 7, 1912. Jesuit priests
4 from Gonzaga University served the church until 1916. (Aff. A. Grasher, ¶ 12)

5 In 1916, the Franciscans established the Presentation of the Blessed Virgin Mary
6 Parish of Deer Park, which initially included portions of Spokane, Pend Oreille and Stevens
7 Counties. The Franciscan friars served the parish and its mission churches until 1968, and
8 during the early years of that period, the priests traveled to Deer Park each weekend from
9 the Franciscan Residence in Spokane.

10 In 1936, the executor of Joseph Reuthinger's estate deeded to the "Catholic Bishop
11 of Spokane" a parcel described as the "South half (S1/2) of Northwest quarter (NW1/4) of
12 Block 4, Original Townsite of Deer Park". With the acquisition of this parcel, the church
13 property now extended over the entire northern one-half of the present-day church campus.

14 In the early 1950's, a separate Franciscan parish was established that included the
15 town of Deer Park, and in 1952, a Rectory was constructed on the church property, just
16 south of the original church, utilizing a building fund raised by parishioners and \$1,177.00
17 of borrowed money, of which \$500.00 was paid in 1953.

18 In the late 1950's, the parishioners began saving money for the construction of a
19 new church and parish hall to replace the concrete block church that had been built in
20 1912. The first "St. Mary's Building Fund" Report from April of 1966 indicates that
21 \$15,323.82 had been deposited in the Chancery as of that date. Newspaper articles from
22 the 1960's include photographs of the old church and rectory and plans for the new
23 structure, and detail the process by which the money was raised and the new church was
24 built. (Aff. A. Grasher, ¶¶ 16-18)

25 On March 23, 1962, Gertrude J. King deeded to "The Catholic Bishop of Spokane, a
26 Corporation Sole," a parcel described as "The North Half (N1/2) of the Southwest quarter
(SW1/4) of Block Four (4) of Deer Park." This extended the church property – which was
still under the administration of the Franciscans – over the northernmost three-quarters of
the present-day campus. A November, 1962 newspaper article dedicated to the "Jubilee"
50th anniversary of the parish indicates that the elderly four-room house was being

1 repaired to serve as a residence for the Sisters who were to come the following summer to
2 conduct a vacation bible school.

3 In February, 1968, at the request of the Franciscans (due to a shortage of
4 Franciscan friars) and with the approval of Rome, the Diocese of Spokane assumed
5 administrative responsibility for St. Mary's parish, and Msgr. John P. Donnelly was
6 appointed as pastor. (Aff. A. Grasher, ¶¶ 17-18)

7 The church and parish hall that are now being utilized by St. Mary's parishioners
8 were built in 1968, with the parish council or administrative board (composed of five
9 laymen, a member of the Altar Society, and a teen-ager elected by other parishioners
10 between the ages of 16 and 20) controlling the entire construction process. Construction
11 of the new church and parish hall was completed in late November of 1968, and the
12 buildings were formally dedicated at a Mass that was celebrated on December 8, 1968.
(Aff. A. Grasher, ¶ 19; Dec. M. McLean, ¶¶ 2-4)

13 According to a "Financial Summary" prepared in April of 1969, the total cost of
14 construction, including pews and furnishings, amounted to just over \$75,000.
15 Approximately \$31,000 of the funding for the project came from savings that had
16 accumulated prior to July of 1968. \$15,000 came from a grant from the Catholic Church
17 Extension Society of America in Chicago, and the balance of the construction cost was
18 financed through loans from the Diocese totaling approximately \$29,000. These loans
19 were to be repaid to the Diocese by the parishioners of St. Mary's Presentation Parish over
20 the succeeding years. (Aff. A. Grasher, ¶ 20; Dec. M. McLean, ¶ 4)

21 On December 8, 1981, St. Mary's acquired the southernmost quarter of the present-
22 day church campus (legally described as "The South 75 feet of the West 150 feet of Block
23 4, Deer Park,") from Mr. Edward Painter, in consideration for payment of \$27,500.00.
24 The money utilized to purchase this parcel of property was loaned to St. Mary's
25 Presentation Parish (at 8.5% interest) by the Diocese, as demonstrated by the Financial
26 Statement dated December 14, 1981. This loan was fully repaid by the parishioners of St.
Mary's over the next 40 months. In 1983, the house on this lot was leased by the parish
administrative board, acting for "St. Mary's Catholic Church" as Lessor, to Keith and
Michelle Peterson. (Aff. A. Grasher, ¶ 21)

1 Subsequently, portions of the house acquired from Mr. Painter were used as
2 classrooms on Sundays. However, in the Spring of 2003, at the recommendation of the lay
3 members of the parish finance council, the lay members of the parish pastoral council
4 decided to demolish this house, which was no longer fit for habitation. St. Mary's hired
5 Larson's Demolition, Inc. to accomplish this task on August 22, 2003, at a cost of
6 \$3,681.37. The demolition contractor's bill was paid by a check issued on St. Mary's Bank
7 of America checking account. The lot has since been covered with gravel, and is now
8 being utilized for much-needed additional parking.

9 In early 2003, St. Mary's parish pastoral council decided to purchase from Mr. Toby
10 Roper (a builder) a house several blocks away from the main church campus. This house
11 was intended to serve as a Rectory or residence for the parish priest, thereby freeing up
12 additional space on the main church campus for offices and classrooms. The total cost of
13 this property was \$123,316.79, and both the \$5,000.00 down payment and the \$118,316.79
14 that was paid at closing were paid from moneys that had been donated by St. Mary's
15 parishioners, and were being kept in St. Mary's account at the Deposit & Loan. (Aff. A.
16 Grasher, ¶¶ 22-23)

17 At the present time, St. Mary's Christian faithful ("Parishioners") consist of a
18 voluntary association of approximately 230 households residing within the geographical
19 boundaries of the parish, which have been adjusted from time to time as new churches
20 have been constructed, and new parishes have been carved out. These individuals and
21 their temporal goods belong to and make up St. Mary's Presentation Parish. A variety of
22 ministries and services typically found in a Roman Catholic parish are associated with St.
23 Mary's.

24 The financial strength or weakness of a parish is dependent almost entirely upon its
25 Christian faithful. Offerings, gifts, and tithes are made by Parishioners of St. Mary's
26 Presentation Parish, for the financial well being of the Parish. St. Mary's, since its
inception, has raised money through weekly collections, tithes, gifts, and capital
campaigns. In recognition of the donations by Parishioners, St. Mary's issues a statement
at the end of each year to each specific donor in accordance with federal income tax
regulations.

1 When St. Joseph's church in the town of Clayton was sold in May of 2003, in
2 recognition of the fact that this church was also located within the boundaries of St. Mary's
3 Presentation Parish, the net proceeds from the sale of that real property (\$44,450.30) were
4 placed in St. Mary's savings account at Bank of America, even though the settlement check
5 was made out to The Catholic Bishop of Spokane, which was the legal title holder of the
property. (Aff. A. Grasher, ¶¶ 24-27)

6 With the exception of a \$15,000.00 grant from the Catholic Extension Society in
7 Chicago, all improvements to this real property, including the demolition and removal of
8 outmoded buildings, have been accomplished with money raised by St. Mary's through its
9 Parishioners, loans repaid by its Parishioners, and/or contributions in kind of labor and
materials from St. Mary's Parishioners. (Aff. A. Grasher, ¶ 29; Dec. M. McLean, ¶¶ 4-7)

10 All insurance premiums relating to parish operations and parish real property are
11 paid by St. Mary's. Although exempt from real property taxes, St. Mary's completes all real
12 property tax exemption forms and pays all fees associated therewith. (Aff. A. Grasher, ¶¶
13 30-31)

14 St. Mary's maintains its own bank accounts, but also participates in a Diocesan
15 Deposit & Loan Fund. The money deposited in the "Deposit & Loan" is traceable to
16 donations from Parishioners. Commercial bank accounts for St. Mary's and its ministries
17 are maintained at Bank of America. St. Mary's account is referenced by St. Mary's federal
18 tax ID # 47-088891. The only signatures to these accounts throughout the history of the
19 Parish are the Parish Pastor, and at times designated Parishioners. (Aff. A. Grasher, ¶¶
32-33)

20 St. Mary's maintains its own financial records using Quickbooks Basic for small
21 businesses. Financial reports are produced on a monthly basis. All income of St. Mary's is
22 derived from donations, tithes, and gifts of Parishioners. The Parish has other employees
23 whom are hired and fired by me. All employees of the Parish are paid by St. Mary's, which
24 submits federal income tax, social security and medicare withholding under its own federal
25 tax ID # of 47-088891. In addition, St. Mary's pays taxes to the Washington Department of
26 Labor & Industries for its employees, under state tax ID # 601-155-740. In addition, St.
Mary's directly contracts with numerous businesses for goods and services. Those

1 vendors contract with, invoice, and bill St. Mary's directly. St. Mary's pays the invoices
2 directly from its checking account. (Aff. A. Grasher, ¶ 36)

3 From time to time, parish money (which is traceable back to St. Mary's bank
4 accounts and further to donations from Parishioners) has been placed on deposit in the
5 Diocese's Deposit & Loan Fund with the clear expectation of its eventual return to St.
6 Mary's for use by the parish. The purpose of the Deposit & Loan Fund is to provide a
7 source of money held in trust by the Diocese from which loans can be made to parishes
8 throughout the Diocese without going through commercial lending institutions. It is my
9 understanding that St. Mary's Presentation Parish does not have any outstanding loans
10 with the Diocese, and that St. Mary's is in fact a net creditor of the Diocese. (Dec. M.
McLean, ¶¶ 3-5)

11 In that regard, as of December 6, 2004, St. Mary's Presentation Parish had
12 \$979,795.94 on deposit in the Deposit & Loan Fund. This large sum of money represented
13 the net accumulated donations from St. Mary's Parishioners (after payment of Parish
14 operating expenses) over approximately the past 20 years. To the extent that these
15 donations were not needed for Parish operating expenses, they were being retained and
accumulated for the ultimate purpose of new construction. (Aff. A. Grasher, ¶ 37-38)

16 In the Spring and Summer of 2004, St. Mary's conducted a capital campaign for the
17 intended purpose of raising sufficient additional monies to supplement the funds on deposit
18 at the Deposit & Loan, in order to completely replace the existing facilities, and fund the
19 construction of a new church, parish hall, classrooms and offices in Deer Park. Thus far,
20 St. Mary's has received more than \$560,000 in pledges toward that hoped-for construction
21 project. As a part of the overall budget for the project, it was anticipated to use the Deposit
& Loan Fund to borrow up to 25% of the expected cost of construction. (Aff. A. Grasher, ¶
22 39)

23 Contrary to the Committee's conclusions, the facts demonstrate St. Mary
24 Presentation is its own legal entity and is the true owner of all equitable and beneficial
25 interest of the real property identified as "St. Mary Presentation" by the Committee.
26

V.

STANDARDS OF REVIEW

A. Declaratory Judgment Standard.

The Committee glosses over the fact that the relief it seeks is entirely declaratory in nature. A declaratory judgment action is ripe for adjudication only where an "actual controversy" exists. Orix Credit Alliance, Inc. v. Wolfe, 212 F.3d 891, 896 (5th Cir. 2000). "As a general rule, an actual controversy exists where 'a substantial controversy of sufficient immediacy and reality [exists] between parties having adverse legal interests.'" Id., citing Middle South Energy, Inc. v. City of New Orleans, 800 F.2d 488, 490 (5th Cir. 1986).

Although some Bankruptcy Courts have entertained declaratory judgment actions filed by trustees when the ownership interest of an asset was in dispute which the trustee asserted was property of the estate on the petition date, the present case is not advanced by a trustee or Debtor-in-Possession. See In re Challenge Air Int'l. Inc., 952 F.2d 384 (11th Cir. 1992); In re Taylor & Campaigne, Inc., 157 B.R. 493 (Bankr. M.D. Fla. 1993); Bottom v. Bottom, 176 B.R. 950 (Bankr. N.D. Fla. 1994); In re Ocean Beach Club, Inc., 79 B.R. 505 (Bankr. S.D. Fla. 1987).

There is no legal relationship between St. Mary Presentation, the Committee, or any Committee members. Furthermore, there is no legal dispute between St. Mary Presentation and the Debtor regarding the ownership interests in real property or trust relationship between the Debtor and St. Mary Presentation. It is correctly described and defined in the Debtor's Statement of Affairs in accordance with the relationship between the parties as established by Canon Law and Civil Law. As such, no actual controversy between parties with adverse legal interests exists.

B. Summary Judgment Standard.

The party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden, he is not entitled to judgment. Adickes v. S.H. Kress & Co., 398 U.S. 144, 156, 26, L.Ed 2d 142, 90 S. Ct. 1598 (1970).

1 In determining whether there are any genuine issues of material fact, the Court must
2 view the evidence in the light most favorable to the nonmoving party. Summers v. A.
3 Teichert & Son, Inc., 127 F.3d 1150, 1152 (9th Cir. 1997). The party opposing summary
4 judgment to survive the motion need only present evidence from which a jury might return a
5 verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial. Id. at
6 1039, citing Anderson v. Liberty Lobby, Inc.

7 The Committee has failed to produce any evidence to support its contention that the
8 beneficial and equitable ownership of the real property does not belong to St. Mary
9 Presentation.

10 However, St. Mary Presentation has not only produced reasonable evidence as to a
11 material issue of fact as to its ownership interest in the real property, it has also produced
12 overwhelming evidence that St. Mary Presentation is the true owner of the real property in
13 question.

14 VI.

15 LEGAL ANALYSIS PREVENTING DECLARATORY RELIEF 16 CONCERNING REAL PROPERTY OWNERSHIP

17 A. Whether Applying Civil Law Or Canon Law, St. Mary Presentation Parish 18 Is A Separate And Distinct Legal Entity.

19 The Committee has conceded that Parishes are unincorporated associations.
20 (See, Committee Statement of Undisputed Fact No. 23) The Committee's
21 acknowledgment of St. Mary Presentation's status as a separate legal entity from
22 the Debtor is consistent with both Civil and Canon Law.

23 1. Washington Law Recognizes St. Mary Presentation As A Legal Entity.

24 The Parish, as an unincorporated association, is a separate legal entity under
25 Washington law. A Parish consists of its Christian faithful. (Canon 515(1)) The Christian
26 faithful ("Parishioners") of each Parish are the residents of their local community. They are
residents of cities, towns, and counties within Eastern Washington, in some cases they are

1 members of sovereign Indian tribes. The Parishioners are the epitome of a voluntary group
2 pursuing a common purpose. In the case of each parish, the common purpose is the
3 fulfillment of their religious tenets.

4 An "unincorporated association" is defined as "[a] [v]oluntary group of persons,
5 without a charter, formed by mutual consent for the purpose of promoting common
6 enterprise or prosecuting common objective. An organization composed of a body of
7 persons united with a charter for the prosecution of a common enterprise." *Black's Law*
8 *Dictionary*, 1531 (6th 1991). This is a broad definition, and Washington has recognized that
9 "associations vary in their nature." *Riss v. Angel*, 131 Wn.2d 612, 635 (1997).
10 Washington's case law recognizes a variety of forms of unincorporated associations,
11 including groups of individuals of a particular religion or creed. See *Bacon v. Gardner*, 38
12 Wn.2d 299 (1951), *Church of Christ v. Carder*, 105 Wn.2d 204 (1986).

13 Unincorporated associations clearly have the ability to hold the equitable interests of
14 a trust and defend that interest in court. *Leslie v. Midgate Center, Inc.*, 72 Wn.2d 977
15 (1967). Washington has repeatedly acknowledged the legal capacity of unincorporated
16 associations to be parties to lawsuits. *Bacon v. Gardner*, 38 Wn.2d 299, 304 (1951); *State*
17 *v. Bothell*, 89 Wn.2d 862, 866 (1978); see also *Church of Christ v. Carder*, 105 Wn.2d 204,
18 206 (1986); *Riss*, 131 Wn.2d 612 (1997). By statute, unincorporated associations have the
19 capacity to appear and represent their interests in declaratory judgment actions. *RCW §§*
20 *7.24.110 - .130* (West 2005). It is well settled law that unincorporated associations have
21 the ability to represent the interests of their members in legal actions. See, *State v. Bothell*,
22 89 Wn.2d at 866.

23 It is important to note that not a single case quoted by the Committee in support of
24 its assertion that each Parish is not a legal entity is from the state of Washington.
25 Bankruptcy Rule 7017 incorporates Rule 17(b), Fed. R. Civ. P., as follows:

26 The capacity of an individual, other than one acting in a representative
capacity, to sue or be sued shall be determined by the law of the individual's
domicile. The capacity of a corporation to sue or be sued shall be determined
by the law under which it was organized. In all other cases capacity to sue or
be sued shall be determined by the law of the state in which the district court
is held

1 As a matter of law, unincorporated associations can be sued under Washington law.
2 The various cases cited by the Committee have no precedential value here in Washington.
3 The Committee's argument that St. Mary Presentation does not have a legal existence
4 separate from the Diocese fails as a matter of law. It is also inconsistent with Committee's
5 Statement of Undisputed Fact No. 23.

6 **2. St. Mary Presentation Is A Separate Legal Entity Under Canon Law.**

7 The Law of the Roman Catholic Church ("Church") has been in existence since the
8 first century. Presently, the Church is governed by the 1983 Code of Canon Law. To the
9 extent the resolution of this matter requires a determination of the relationship between the
10 Debtor and St. Mary Presentation in their methods of governance, interaction or
11 management, compulsory deference is required to the provisions of the Code of the Canon
12 Law which govern these religious organizations under applicable law. The Supreme Court,
13 when faced with issues involving the Roman Catholic Church, has stated:

14 In the absence of fraud, collusion or arbitrariness, the decisions of proper
15 church tribunals on matters purely ecclesiastical, although affecting civil
16 rights, are accepted in litigation before the secular courts as conclusive,
17 because the parties in interest made them so by contract or otherwise. Under
18 like circumstances, effect is given in the courts to the determination of the
19 judiciary bodies established by clubs and civil associations.

20 Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16-17, ___ S.Ct. ___, 74 L.Ed.131,
21 137 (1929) (citing Watson v. Jones, 13 WALL 676, 20 L.Ed. 666 (___)).

22 This legal principle has been clearly adopted by the Washington State Supreme
23 Court, when addressing real property interests involving a hierarchal church. See,
24 Wilkerson v. Rector, etc., St. Luke Parish, 176 Wash. 377 (1934); See also, Church of
25 Christ v. Carder, 105 Wn.2d 204 (1986); Southside Tabernacle v. Church of God, 32 Wash.
26 App. 814 (1982) (All applying the compulsory deference rule established in Watson to
disputes involving church property.)

27 In this case, the identity of the Parish, the Parishioners, the Debtor, and their
28 relationship to their property rights are defined within Canon Law. These relationships, are
29 "purely ecclesiastical, though affecting civil rights, [and] are [to be] accepted in litigation

1 before secular courts as conclusive[.]” Gonzalez, 280 U.S. at 16, ____ S.Ct. at ____, 74 L.Ed.
2 at 137.

3 Within the Church, besides physical persons, there are also juridic persons, that is,
4 subjects in Canon Law of obligations and rights which correspond to their nature. (Canon
5 113(2)) A juridic person is an artificial person distinct from all natural persons or material
6 goods. Like a civil law corporation, it is a legal entity which can and must be conceived
7 apart from the natural persons who constitute it, administer it, or for whose benefit it exists.
8 See L. Chiappetta, *Il Codice di Diritto Canonico: Commento Giuridico-Pastorale*, 2nd ed.
9 (Rome: Dehoniane, 1996) 1:169; Robert Kennedy, *New Commentary on the Code of*
10 *Canon Law* (Paulist Press 2000).

11 Canon Law provides that:

12 A parish is a certain community of the Christian faithful stably constituted in a
13 particular church, whose pastoral care is entrusted to a pastor as its proper
14 pastor under the authority of a diocesan bishop. (Canon 515(1))

15 Canon 515(3) states:

16 A legitimately erected parish possesses juridic personality by the law itself.
17 (Canon 515(3))

18 In this case, there is no dispute that St. Mary Presentation is a legitimately erected
19 Parish and a juridic person under Canon Law.

20 Canon Law is clear that property acquired by a Parish belongs to the Parish.
21 Specifically, Canon 1256 states:

22 Under the supreme authority of the Roman Pontiff, ownership of goods
23 belongs to that juridic person which has acquired them legitimately. (Canon §
24 1256)

25 Since its inception, the Christian faithful themselves, which constitute the Parish,
26 have acquired both real and personal property which is used by the Christian faithful in their
fulfillment of their religious tenets. Under Canon Law, the property was acquired by, used
by, improved, maintained, and owned by each Parish independently. (Canons 1257-1272)

1 The juridic person (Parish) may not be deprived of its property without consent and
2 approval. (See Canons 1281–1288 and 1291-1295)

3
4 **3. Committee Waived Argument on Individual Parish Standing.**

5 The Committee's decision to name and sue St. Mary Presentation and 81 other
6 Parishes individually is evidence of the separate legal identity of each parish. Furthermore,
7 the Committee admits that St. Mary Presentation is a separate unincorporated association
8 in its Statement of undisputed Facts. (CSF No. 23) The doctrine of judicial estoppel
9 prevents a party from taking divergent positions in different legal proceedings. Wagner v.
10 Proff Engineers in California Court, 354 F.3d 1036, 1044 (9th Cir. 2004).

11 In addition, the request for relief in the Complaint seeks substantive consolidation of
12 St. Mary Presentation with the Debtor. Substantive consolidation in bankruptcy terms is the
13 consolidation of a non-debtor entity with a separate debtor entity. (See Alexander, 229
14 F.3d 750 (9th Cir. 2000)) As such, the Committee has already recognized the legal identity
15 of St. Mary Presentation is separate and apart from the Debtor. The Committee should be
16 estopped from taking a contrary position for purposes of its Motion.

17
18 **4. Judicial Estoppel Does Not Apply to St. Mary Presentation.**

19 St. Mary Presentation does not dispute the definition of judicial estoppel submitted
20 by the Committee which is designed to prevent a party from taking divergent positions in
21 different legal proceedings. See the Committee's Memorandum at p. 18, citing Wagner v.
22 Prof. Engineers in California Gov't, 354 F.3d 1036, 1044 (9th Cir. 2004). However, the
23 Committee fails to present a full recitation of the elements required for a finding of judicial
24 estoppel, and it is in those elements that the Committee's position is revealed to be flawed.

25 The United States Supreme Court recently listed three factors that
26 courts may consider in determining whether to apply the doctrine of judicial
estoppel:

First, a party's later position must be "clearly inconsistent" with its
earlier position. Second, courts regularly inquire whether the party has
succeeded in persuading a court to accept that party's earlier position, so that

1 judicial acceptance of an inconsistent position in a later proceeding would
2 create "the perception that either the first or the second court was misled[.]"
3 Absent success in a prior proceeding, a party's later inconsistent position
4 introduces no "risk of inconsistent court determinations," and thus no threat to
5 judicial integrity. A third consideration is whether the party seeking to assert
6 an inconsistent position would derive an unfair advantage or impose an unfair
7 detriment on the opposing party if not estopped. In enumerating these
8 factors, we do not establish inflexible prerequisites or an exhaustive formula
9 for determining the applicability of judicial estoppel. Additional considerations
10 may inform the doctrine's application in specific factual contexts.

11 Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782-783 (9th Cir. 2001), citing New
12 Hampshire v. Maine, 121 S. Ct. 1808, 1815 (2001) (internal citations omitted). The
13 application of judicial estoppel is appropriate to bar litigants from making incompatible
14 statements in two different cases. Risetto v. Plumbers & Steamers Local 343, 94 F.3d 597,
15 605 (9th Cir. 1996).

16 The position taken by St. Mary Presentation is not inconsistent with the holding of
17 the cases cited by the Committee. In Munns v. Martin, 131 Wn. 2d 192, 196 (1977) (*en*
18 *banc*), the case was actually filed by the individual members of St. Patrick's Parishioners
19 and Friends of Historic Preservation. Of the seven members, six were members of the
20 Parish. *Id.* at 196. The issue arose when the "St. Patrick Building Committee," a parish
21 committee, applied for a demolition permit related to St. Patrick School. This was a case of
22 historic preservation interests vs. parish building committee interests, Parishioner v.
23 Parishioner. *Id.* at 194-199. The case holding invalidated a statute that was being used by
24 a non-parishioner in an attempt to stop a building project advanced by a parish building
25 committee for the furtherance of the Church's fundamental right to exercise religion. The
26 ordinance was found to have a coercive effect on the practice of religion.

The second case, Miller v. Catholic Bishop of Spokane, 2004 WL 2074328 (Wash.
App. 2004), is an unpublished decision. As a matter of law, this opinion should not have
been cited. "[U]npublished opinions of the Court of Appeals will not be considered in the
Court of Appeals and should not be considered in the trial courts. They do not become a
part of the common law of Washington." State v. Fitzpatrick, 5 Wn. App. 661, 668
(1971)(emphasis added).

1 Regardless, in Miller, the Catholic Bishop of Spokane was sued for damages based
2 upon the plaintiff's fall from a loft opening. The Bishop defended the action based on its
3 ownership of the property, which was the Parish Hall of Sacred Heart Catholic Church in
4 Springdale, Washington. However, this is not a position that is "clearly inconsistent" with
5 the current position taken by the Diocese and the Parishes. There is no assertion or
6 indication as to the nature of the Bishop's ownership interest. In this bankruptcy case, the
7 Diocese and the Parishes assert that the Diocese holds an ownership interest in the
8 property, but holds that interest in trust for the Parishes. This is not an inconsistent
9 position. Rather, the ownership status of the Bishop in Miller was never addressed or
10 litigated. Further, the Bishop did not "succeed in persuading a court to accept that party's
11 earlier position" because the **nature** of the Bishop's ownership interest was never at issue.
12 Therefore the current position, which is consistent with the prior position, introduces no risk
13 of inconsistent court determinations.

14 **5. The Committee's Reliance Upon F.E.L. Publication, Ltd. v. The Catholic**
15 **Bishop of Chicago and Oregon Case Law is Misplaced.**

16 First, both Oregon and Illinois apply a neutral principle of law approach to church
17 property issues. When examining church property disputes, Washington applies the more
18 stringent approach of compulsory deference. Furthermore, the legislative histories and
19 governing statutes concerning corporate soles is much different than that of Washington.

20 F.E.L. Publications was a seventh circuit case which decided the issue on the legal
21 relationship between the Diocese and the Parishes within it in order to resolve a claim
22 against the diocese for tortious interference with a business relationship. There the Court
23 held that it was impossible for the cause of action to be based on the Diocese's directives
24 to the Parishes as those Parishes had no independent status, and were in fact "subsumed
25 under the Catholic Church." F.E.L., 754 F.2d at 221. In concluding this, the court relied
26 primarily upon Illinois case law, and in particular Haymes v. Catholic Bishop of Chicago, 41
Ill.2d 336 (1968), Catholic Bishop of Chicago v. Village of Palos Park, 286 Ill. 400 (1919)
and Galich v. Catholic Bishop of Chicago 75 Ill.App.3d 538 (1979). The case primarily
relied upon was Galich, however, that issue was not before the court in Galich.

1 In Galich, the Court held that the statute under which the Bishop of Chicago
2 incorporated did not create a statutory trust for the benefit of the Parishioners bringing the
3 case. Further, the Court held that any determination of the ability or inability of the Bishop
4 to demolish a church would violate the First Amendment.

5 The statute under which the case was decided was subsequently amended. As
6 amended, it includes a great deal of language indicating a legislative intent to create a trust
7 for the benefit of the religious congregation for whom the corporation is formed.

8 The other cases relied upon by the F.E.L. Court only support its conclusion by
9 inference. In Haymes, the Catholic Bishop of Chicago was named the defendant in a slip
10 and fall case at a Catholic school. While the issue was not addressed by the Court in
11 Haymes, the implication is that the Catholic school could not have been the proper
12 defendant. In Village of Palos Park, the Catholic Bishop of Chicago essentially challenged
13 the validity of a local zoning ordinance precluding the creation of a cemetery in the space
14 the Catholic Bishop wished to make one. Again, only by the inference that the Catholic
15 Bishop was the only party which could have brought the action does this case support the
16 conclusion reached by the F.E.L. Court.

17 **B. The Bankruptcy Estate Of The Diocese Does Not Have An Interest In The Real**
18 **Property At Issue.**

19 The Committee argues in its Complaint and subsequent Motion that by virtue of its
20 interpretation of law and facts that St. Mary Presentation's real and personal property is
21 property of the Debtor's bankruptcy estate. However, this argument is not substantiated.
22 Section 541 of the Bankruptcy Code specifically excludes from the estate property to which
23 the Debtor holds legal title, but has no equitable or beneficial interest. (See 11 U.S.C. §
24 541(b), (c), and (d))

25 The concept of trust relationships, bare legal title, and beneficial/equitable ownership
26 of property is not new to bankruptcy courts. Courts have repeatedly held that when a debtor
holds mere legal title to property and a non-debtor holds the beneficial or equitable
ownership of that property, said property is not property of the estate. See Matter of
Torrez, 63 BR 751, 754-55 (9th Cir. BAP 1986)(imposition of resulting trust appropriate

1 since title was only put in children's name to avoid certain restrictions in a government
2 program); Sale of Guar. Corp, 220 BR 660, 664 (9th Cir. BAP 1998)(where the transferee of
3 property does not pay the purchase price for the property, the transferee is presumed to
4 hold the property in a resulting trust for the party who paid the consideration for its
5 purchase).

6 The standard of inquiry under section of the Bankruptcy Code excluding from
7 property of the estate trust interests that are subject to transfer restrictions enforceable
8 under applicable non-bankruptcy law, normally has three parts.

- 9 (1) whether the debtor has a beneficial interest in a trust;
- 10 (2) whether there is a restriction on the transfer of that interest; and
- 11 (3) whether the restriction is enforceable under non-bankruptcy law.

12 In re Wilcox, 233 F.3d 899 (6th Cir. 2000)

13 The evaluation of each element is resolved in accordance with and through the
14 application of state law. Butner v. United States, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d
15 136, 141-42 (1979).

16 Washington law clearly establishes that the Debtor holds only "bare legal title" to the
17 property in question. St. Mary Presentation is the true beneficial and equitable ownership
18 of the real property in dispute.

19 **1. St. Mary Presentation Parish Is The Beneficiary Of A Statutory Trust,** 20 **Holding All Equitable And Beneficial Interest In The Real Property.**

21 The corporation sole statute in Washington clearly and explicitly creates a statutory
22 trust comprised of the disputed property held for the benefit of the Church and its
23 parishioners. RCW Ch. 24.12. The Debtor incorporated under this chapter in 1915.

24 The legislative history is absolutely clear that the statute was enacted to create a
25 trust relationship. The bill, as introduced in the Senate by two Spokane Senators, was
26 entitled:

An Act providing for the organization of corporations sole, defining their
powers, authorizing them to transact business and hold property in trust for
religious denominations societies or churches.

1 S.B. 188 (Journal of Senate, 1915, p. 283) (emphasis added). After its introduction,
2 it was referred to the Senate Committee on Corporations other than Municipal. Id. After
3 review by the Committee, recommended that the bill be passed the Senate on March 6,
4 1915.

5 The bill was subsequently passed by the house on March 10, 1915, and was
6 approved by the Governor March 15, 1915.

7 The passed Senate Bill 188 became Session Law, Chapter 79. "Organizations and
8 Powers of Corporations Sole."

9 Section 3 specifically states:

10 . . . Provided, all property held in such official capacity by such bishop,
11 overseer or presiding elder, as the case may be, shall be in trust for the use,
12 purpose, benefit, and behoof of his religious denomination, society or church.

13 S.B. 188 (Session Laws, 1915, Chapter 79, p. 254)

14 As a corporation sole, the Debtor has the power to contract, sue, and be sued in
15 court. R.C.W. § 24.12.020 (West 2005). A corporation sole also has the power to deal in
16 real and personal property in the same manner as any natural person. Id. This grant of
17 legal capacity is explicitly for the benefit of the trust created under this chapter. Id. The
18 trust is comprised of all the property held by the Debtor in its official capacity. RCW §
19 24.12.030 (West 2005). Specifically the statutes state:

20 . . . All property held in such official capacity by such bishop, overseer or
21 presiding elder as the case may be, shall be in trust for the use, purpose,
22 benefit and behoof of his religious denomination, society or church.

23 RCW § 24.12.030 (West 2005).

24 Every corporation sole shall, for the purpose of the trust, have the power to
25 contract in the same manner and to the same extent as a natural person, and
26 may sue and be sued, and may defend in all courts and places, in all matters
and proceedings whatever, and shall have authority to borrow money and
give promissory notes therefor, and to secure the payment of the same by
mortgage or other lien upon property, real and personal; . . .

RCW § 24.12.020 (West 2005)(emphasis added). This statute defines the legal
relationship between the Debtor, St. Mary Presentation, and Parishioners as a relationship
of trustee and beneficiary. See, RCW § 24.12.030 (West 2005). This is also consistent

1 with the norms of Canon Law which provide that each parish is a Church capable of
2 acquiring and owning real and personal property interests.

3 Despite this clear statute and governing principles of Canon Law, the Committee
4 misconstrues Washington case law explicitly recognizing the restrictions existing on
5 property impressed with a trust by dedication to religious organizations for the benefit of
6 such organizations. In Wilkeson v. Rector, etc. St. Luke's Parish, 176 Wash. 377, 386
7 (1943), cited by the Committee, the Court explicitly notes that while the alienation of the
8 property in that case was within the power of the trustee, the use of the proceeds from the
9 sale could not be diverted from the benefit of the religious purposes for which the property
10 was donated. Wilkeson, 176 Wash. at 385. ("In passing, it may be conceded that, if the
11 purpose of respondents was to divert the funds to be received from the sale of the property
12 to other than religious purposes of the Episcopal Church, the court could and would enjoin
13 them. The trustee is merely the holder of the legal title.") Even the court's explicit holding,
14 quoted only in part by the Committee, recognizes that courts will ensure that property of a
15 trust which is held to benefit a religious society cannot lawfully be diverted from the purpose
16 for which the trust is held. Id. at 386. Specifically, the court stated: "For in a trust of the
17 character involved here, where no restraint is imposed on the right to alienate, the courts
18 will not interfere further than to see to it that the proceeds from the sale of the trust property
19 are not diverted from the use for religious purposes of the faith or denomination to which
20 the property was dedicated." Id. (emphasis added).

21 Despite the Committee's assertion that "[t]he corporation sole statute's 'trust' for the
22 Church is no different than the trust in Wilkeson ..." (Committee's Memo, p. 11) the
23 Committee disregards the court's explicit statements upholding restrictions on the use of
24 the trust res and its proceeds, and identifying that "[t]he trustee is merely the holder of the
25 legal title." Id. at 385. The Committee's memorandum repeatedly fails to distinguish
26 between the rights and obligations of a trustee as the legal title holder of property, and the
existence of an equitable interest in the property, attempting instead, to equate the holding
of legal title by the Catholic Bishop of Spokane with the absence of the existence of a trust.
This merely evidences a lack of recognition of the distinction between legal title and an
equitable interest, and does not support the Committee's argument that no trust exists.

1 The Catholic Bishop of Spokane is the trustee of the statutory trust created under
2 RCW chapter 24.12. Whether or not, as trustee, the Catholic Bishop of Spokane has the
3 power to alienate certain property of the trust, any such alienation must be for the "benefit
4 and behoof of his religious denomination, society or church." RCW § 24.12.030 (West
5 2005). With regard to "proceeds from the sale of the trust property," they "are not to be
6 diverted from the use for religious purposes of the faith or denomination." Wilkerson, 176
7 Wash. at 386. The statutory trust under which the property is held reserves the beneficial
8 use of the property for St. Mary Presentation.

9 **2. St. Mary Presentation Is The Beneficiary Of An Express Trust.**

10 The recognition and observance of the civil duties of a trustee have been impressed upon
11 the Debtor since its incorporation. The Catholic Bishop of Spokane was incorporated as a
12 corporation sole under the foregoing statute on July 3, 1915. With respect to St. Mary
13 Presentation Parish, this trust relationship commenced with the formation of the Parish.
14 The Washington Supreme Courts has noted that statements in articles of incorporation can
15 be sufficient to create an express trust. Hoffman v. Tieton View Methodist Church, 33
16 Wn.2d at 727 (1949) ("There is no question in our minds but that all property acquired by
17 Tieton View was, under article VIII of its articles of incorporation ... held in trust for the uses
18 of the Methodist Church...").

19 The articles of incorporation clearly express the intent of creating and maintaining a
20 trust for the benefit of the members of the Roman Catholic faith. Specifically, the articles
21 expressly provide:

22 **ARTICLE III**

23 This corporation is formed for the purpose of transacting business and
24 **holding property in trust** for that certain religious denomination or society
25 known as the Roman Catholic Church; to do business and contract in the
26 same manner and to the same extent as a natural person; to borrow money
and give promissory notes therefor, and to secure the payment of the same
by mortgage or other lien upon property real and personal; to buy, sell, lease,
mortgage, and in every way use and deal in real and personal property and to
receive bequests for its own use or upon trusts.

ARTICLE IV

The incorporator of this corporation is Augustine F. Schinner, who is the duly appointed, qualified and acting Roman Catholic Bishop of the Diocese of Spokane, in the state of Washington, and who as such Bishop of the Roman Catholic Church has subscribed these Articles of Incorporation, in order to become a corporation sole, together with his successors in office by his official designation, in the manner prescribe in "An Act Providing for the Organization of Corporations Sole, Defining Their Powers, **Authorizing them to transact business and hold property in trust for religious denominations, societies or churches.**" passed by the Legislature of the State of Washington and approved by the Governor, March 15th, 1915.

ARTICLE V

This incorporation is a religious corporation, not organized for gain and is without capital stock, **all property held by it being in trust** for the use, purpose, benefit and behoof of the Roman Catholic Church of the Diocese of Spokane, in the State of Washington.

(Articles of Incorporation, 713115, Emphasis Added)

An express trust "arises because of the expressed intent and involves a fiduciary relationship in which the trustee holds property for the benefit of a third party." Goodman v. Goodman, 128 Wn.2d 366, 372 (1995). Ninety years ago, the Bishop of Spokane clearly expressed the intent to hold property in trust for the benefit of the Parishes of the Church of the Diocese of Spokane.

A trust will be found to exist if there is a clear manifestation of an intent to create a trust, and the entire instrument, as well as its general purpose and scope, should be considered, and the instrument should be construed in light of the circumstances surrounding its execution. See, Hoffman v. Tieton View Meth. Ch., 33 Wn.2d 717, 726 (1949).

In this case, the trust instrument consists of the deed, which contains explicit language referencing the fact title is held by a "Corporation Sole." The statute governing corporation soles, RCW 24.12 et seq., clearly puts others on notice that a trust relationship exists.

Just as use and occupancy of property is sufficient to place others on notice of the possessor's interest, (Miebach v. Colasurdo, 102 Wn.2d 170, 173, 177 (1984)) and the failure of a spouse to record an interest in community property does not preclude that spouse from defending that interest in court, (Campbell v. Sandy, 190 Wash. 528, 531

(1937)), the use, improvement and maintenance by St. Mary Presentation of property recorded in the name of a corporation sole, places the world on notice of the statutory trust under which it is held, and identifies the true nature of the Debtor's interest in the property. Cf. In re Country Club Market, 175 B.R. 1005, 1009 (D. Minn. 1994) (finding a valid statutory trust, and noting that such a finding creates no burden on creditors "[a]s opposed to contractual or implied trusts, the stature is public. There is no secret agreement between" the parties.).

1. Statute Of Frauds Does Not Make The Express Trust In This Case Defective.

Generally, the statute of frauds will prevent parol evidence from enforcing the terms of an oral trust absent fraud or other circumstances. In re Marriage of Lutz, 74 Wn. App. 356, 365 (1994). An exception to the requirement for an express trust over real property is a situation where a beneficiary of the trust has partially performed in accordance with the trust. Diel v. Beekman, 7 Wn. App. 139, 144 (1972), overruled on other grounds, Choplin v. Sanders, 100 Wn.2d 853 (1984).

The standard for evaluating partial performance is whether the beneficiary, with the consent of the trustee:

- a. Enters into possession of the land;
- b. Makes improvements to the land; and
- c. Changes position in reliance of the trust.

See, Diel at 144-145.

As demonstrated in the Statement of Facts in this Memorandum (Section IV), St. Mary Presentation and its parishioners have held possession of the property to the exclusion of all others. St. Mary Presentation has made all improvements to the land and maintained the structures thereon. All donations have been received with the understanding that St. Mary Presentation improved the real property to fulfill religious tenets of the Parish. Such actions were taken with the understanding the Church property was property belonging to St. Mary Presentation.

1 **C. The Committee Ignores Statutory Restriction On Institutional Funds.**

2 The Committee's discussion of the administrative dissolution of nonprofit
3 corporations is wholly irrelevant to the enforceability of the restrictions placed on property
4 donated to St. Mary Presentation under Washington law. This is not an instance of an
5 administrative dissolution by the state, but a reorganization under Title 11 of the United
6 States Code. Further, St. Mary Presentation is subject to the Uniform Management of
7 Institutional Funds Act, RCW Chapter 24.44, which provides only two methods for the
8 release of a restriction placed on donations. RCW § 24.44.060.

9 Under Washington law, donations given with restrictions as to their use, to
10 incorporated or **unincorporated organizations operated for religious**, educational, or
11 other eleemosynary purposes, can only be used in accordance with the restrictions unless
12 (1) the donor gives written consent releasing the restriction, or (2) an order is obtained in
13 Superior Court upon a finding that the restriction is (i) obsolete, (ii) inappropriate, or (iii)
14 impracticable. R.C.W. § 24.22.060. Further, the statute requires that the Attorney General
15 be given notice and opportunity to be heard on any such matter before the Superior Court
16 makes its findings, and expressly retains the application of the judicial doctrine of *cy pres*.
17 *Id.* Contrary to the claim's of the Committee, Washington's Legislature and Judiciary have
18 a long and well established tradition of honoring the intention of the donors and benefactors
19 of religious organizations.

20 The facts of this case demonstrate that the real property at issue was paid for with
21 donated funds, improved, and maintained with donated funds for the benefit of St. Mary
22 Presentation.

23 **D. If The Court Concludes That A Statutory Trust Or An Express Trust Does Not**
24 **Exist, A Resulting Trust Should Be Found In Favor Of St. Mary Presentation.**

25 Even if the statutory and express trusts are found to be ineffective, the acquisition
26 the property in dispute clearly gives rise to a resulting trust. "It is well settled that where
property is taken in the name of a grantee other than the person advancing the
consideration, the one in whose name title is taken is a resulting trustee for the person who
paid the purchase price, in the absence of proof of a contrary intention." Mading v.

1 McPhaden, 50 Wn.2d 48, 53 (1957). "That grantee is presumed to hold legal title subject to
2 the equitable ownership of the person advancing the consideration." Stocker v. Stocker, 74
3 Wn. App. 1, 6 (1994) (quoting, Thor v. McDearmid, 63 Wn. App. 193, 206 (1991)).
4 "Similarly, where property is transferred to one person and the purchase price is advanced
5 by him as a loan to another, a resulting trust arises in the latter's favor." Mading, 50 Wn.2d
6 at 54. Resulting trusts are equitable in nature, and may be established by parole evidence
7 of a clear, cogent and convincing nature. Stocker, 74 Wn. App. at 6. As evidenced at
8 Section IV – Statement of Facts – all acquisitions of real and personal property, all
9 improvements, and all maintenance of the property was paid for with money directly
10 traceable to parishioners, for the benefit of Parishioners, with the clear understanding and
11 intent that it was for the benefit of Parish property. Just as in the case of Matter v. Torrez,
12 63 BR 751, 754-755 (9th Cir. BAP 1986), the imposition of a resulting trust is appropriate
13 since title was placed in the name of the corporation sole with the understanding it was held
14 in trust for St. Mary Presentation. The Bishop never intended to actually own the property
15 or assert control over the property or improvements as exclusive owner.

16 **E. If The Diocese Is Forced To Breach Its Fiduciary Duty And Trust Relationship**
17 **owed to St. Mary Presentation, A Constructive Trust Must Be Imposed.**

18 The facts surrounding the nature of the relationship between the Debtor, St. Mary
19 Presentation, and the acquisition of the property establish a constructive trust for the
20 benefit of St. Mary Presentation. "A constructive trust is an equitable remedy which arises
21 when the person holding title to property has an equitable duty to convey it to another on
22 the grounds that they would be unjustly enriched if permitted to retain it." Lakewood v.
23 Pierce County, 144 Wn.2d 118, 126 (2001). A constructive trust will be "imposed when
24 there is clear, cogent and convincing evidence of the basis for impressing the trust." Id. To
25 establish a constructive trust, a "party must show the trust arose from the relationship of the
26 parties involved, and that the property justly belongs to that party." Id. at 129. Here, the
intent of the parties was to create valid statutory and express trusts, the beneficial use of
the property was at all times held reserved by and for St. Mary Presentation. Not only is
there clear, cogent and convincing evidence for the imposition of a trust, but for the Court to

1 hold that the property in dispute belongs to the Debtor would unjustly enrich the Debtor to
2 the detriment of St. Mary Presentation who has relied on its ownership of the property since
3 the parish was founded.

4 **F. The Committee's Catch All Argument Of "Alter Ego" Fails As A Matter Of Law**
5 **And Fact.**

6 The "Alter Ego" theory advanced by the Committee is merely a disguised attempt to
7 circumvent legal deficiencies in its third claim for relief of substantive consolidation. In this
8 case, the Committee is asking the Court to rule that St. Mary Presentation is liable for the
9 debts of the Debtor, a corporation sole, even though St. Mary Presentation is a separate
10 legal entity and is clearly not a "shareholder" of the Debtor.

11 When Washington Courts invoke "piercing the corporate veil", they have applied the
12 "doctrine of corporate disregard" based upon two elements:

- 13 a. "The corporate form must be intentionally used to violate or evade a duty,"
14 and
15 b. "Disregard must be necessary and required to prevent unjustified loss to the
16 injured party."

17 See, Meisel v. M & N Modern Hydraulic Press Co., 97 Wn.2d 403, 410, 645 P.2d
18 689 (1982)

19 The first factor requires a showing of abuse of the corporate form, typically involving
20 fraud, misrepresentation, or other action **by the corporation that harms the creditor and**
21 **benefits the shareholder.** The second factor requires that the harm must actually occur.
22 In this case, the Committee has neither plead nor demonstrated any facts to support both
23 requirements of an "Alter Ego Claim."

24 The undisputed facts offered by St. Mary Presentation demonstrate a claim of "Alter
25 Ego" is without merit. (See Statement of Facts, Section IV)
26

1 **1. The Committee Attempts To Circumvent Statutory Prohibitions Against**
2 **Substantive Consolidation Of A Not "Moneyed" Entity.**

3 The Committee's Complaint, in its third cause of action, seeks a declaratory order for
4 substantive consolidation "all Diocese Related Entities." The Committee's Motion for
5 Summary Judgment now seeks a declaratory order under a theory of "Alter Ego." Such a
6 legal theory is nothing more than a thinly veiled attempt to place St. Mary Presentation and
7 other non-debtor/non-moneyed religious entities into an involuntary bankruptcy. Relief
8 which is forbidden by the Code. See, 11 U.S.C. § 303(a) and corresponding legislative
9 history. House Report No. 95-595, 95th Cong., 1st Sess 321 (1977).

10 The Bankruptcy Code clearly recognizes that not all debtors are the same. And
11 while Chapter 11 and its provisions do not generally distinguish between for-profit, non-
12 profit, and religious organizations for the purposes of reorganization, that is not to say that
13 a distinction does not exist and should not or cannot be made. For example, under the
14 Bankruptcy Code non-profit corporations are treated more favorably than for-profit
15 organizations. See, e.g., 11 U.S.C. § 303(a) (excluding non-profit organizations from
16 involuntary bankruptcy); 11 U.S.C. § 1112(c) (forbidding a court from converting a case
17 filed by a non-profit from Chapter 11 to Chapter 7 without consent). Congress has
18 recognized that religious organizations present unique bankruptcy issues because
19 government regulation of religion implicates First Amendment rights. For example, the
20 Bankruptcy Code has been modified by Congress to protect free exercise of religion to
21 prevent a trustee from avoiding a debtor's donation given to a religious or charitable
22 organization. See Religious Liberty and Charitable Donation Protection Act of 1998, Pub.
23 L. No. 105-183, 112 Stat. 517 (1998).

24 Substantive consolidation has no express statutory basis, but rather, is a "product of
25 judicial gloss." In re Augie/Restiro Bakery Co. Lt., 860 F.2d 515, 518 (2nd Cir. 1988).
26 Substantive consolidation results in pooling the assets of, and claims against, the two
 entities, satisfying liabilities from the resultant common fund; eliminating inter company
 claims; and combining creditors of the two companies for purposes of voting on
 reorganization plans. In re Bonham, 229 F.3d 750, 764 (9th Cir. 2000).

1 In the present case, even if the Committee could get around the statutory
2 prohibitions, the Committee would have to demonstrate 1) that the Committee or its
3 members dealt with St. Mary Presentation Parish and the Debtor as a single economic unit
4 and did not rely on the separate credit of each of the entities; or that the operations of the
5 Debtor and St. Mary Presentation Parish were **excessively** entangled with the Debtor's
6 affairs to the extent that consolidation will benefit all creditors. See In re Bonham, 229 F.3d
7 750, 766 (9th Cir.).

8 The newly surfaced "Alter Ego" theory is nothing more than a recognition that
9 Committee's third cause of action has no application in this case.

10 **G. Subjecting The Parish To Declaratory Relief of this Nature Violates First**
11 **Amendment Rights Of Free Exercise And The Religious Freedom Restoration**
12 **Act.**

13 The exercise of religion includes the "right to believe and profess whatever religious
14 doctrine one desires" and prevents the government from "lendi[ng] its power to one side or
15 another in controversies over religious authority or dogma." See Smith, 494 U.S. at 877
16 (citations omitted). To protect the exercise of religion, the Supreme Court has held that if
17 the government "substantially burdens" a person's exercise of religion, and the government
18 does not demonstrate that it has a "compelling government interest" to justify the religious
19 burden, then the government intrusion into a person's free exercise of religion has been
20 violated. See Sherbert v. Verner, 374 U.S. 398, 406 (1963). However, this Court later
21 limited Sherbert by holding that "the right of free exercise does not relieve an individual of
22 the obligation to comply with a 'valid and neutral law of general applicability . . .'" See
23 Smith, 494 U.S. at 879 (citations omitted). Public opposition to the Smith holding was
24 immediate and forceful. Congress enacted the Religious Freedom Restoration Act, 42
25 U.S.C. § 2000bb-1 (1993)(hereinafter, RFRA), "to restore the compelling interest test as set
26 forth in Sherbert," and "to guarantee its application in all cases where free exercise of
religion is substantially burdened," including cases in which the law at issue was of "general
applicability." See 42 U.S.C. § 2000bb(b)(1), (2). In Boerne v. Flores, 521 U.S. 507
(1997), the Supreme Court declared RFRA unconstitutional as applied to state actions

1 because Congress had exceeded the scope of its power under Section 5 of the Fourteenth
2 Amendment in enacting the law. See Boerne, 521 U.S. at 527 (RFRA “intruded into an
3 area reserved by the Constitution to the States”). However, RFRA continues to be
4 constitutional as applied to federal law. See infra Part I.B.4.

5 Under RFRA, a neutral law of general applicability is an unconstitutional
6 infringement of a person’s free exercise rights if the following is true: (1) the law
7 substantially burdens a person’s exercise of religion; (2) the government cannot justify the
8 law with a compelling government interest; and (3) there are no less restrictive means of
9 furthering the government’s compelling interest. 42 U.S.C. § 2000bb-1(a), (b).

10 Two unique circumstances arise would occur if the Court were to dictate the
11 ownership and use of Parish property: (1) a religious leader will have been replaced by a
12 government official as the head of a religious organization, resulting in comprehensive
13 government surveillance of religion; and (2) a government official will be in an
14 unprecedented position of decision making power over a church/Parish, a position
15 traditionally given only to a spiritually mandated leader, the Pastor of the Parish, resulting in
16 the appearance of government endorsement of religion for the benefit of a creditor’s
17 committee.

18 St. Mary Presentation’s economic interests cannot be separated from its spiritual
19 interest – any economic decision the Court makes regarding use or ownership of property
20 inevitably has direct and significant religious consequences. Thus, the Court will become
21 hopelessly entangled with religious policy of the Catholic Church. The effect of St. Mary
22 Presentation’s spiritual mission is that every financial decision it makes is driven by
23 religious objectives toward religious ends in accordance with Canon Law. This creates an
24 irreconcilable church versus state conflict between a non-debtor, a creditors committee,
25 and the Court. By effectively forcing a Parish into bankruptcy by way of declaratory relief,
26 the government is changing the essential structure of St. Mary Presentation under Canon
Law. Since the Canon directs the religious vision and thus the financial objectives of St.
Mary Presentation, such a change would essentially allow government to determine who
benefits from St. Mary Presentation’s mission.

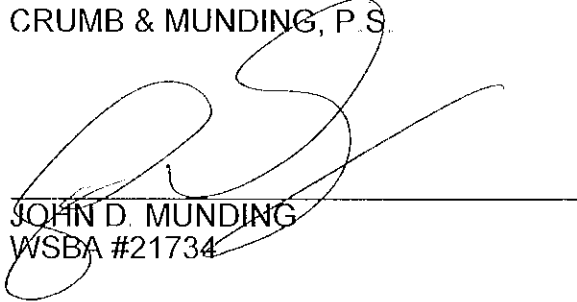
VII.

CONCLUSION

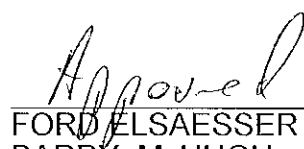
As a matter of law, the Committee has not established a case in controversy with St. Mary Presentation that would permit the declaratory relief requested. Even if the Court were to consider the pending motion for summary judgment based upon the Committee's factual theory, the Committee's motion fails as the Committee has failed to eliminate material questions of fact as to St. Mary Presentation's ownership interest in the real property, including furnishing all consideration for purchase, improvements, and maintenance.

DATED this 25th day of May, 2005.

CRUMB & MUNDING, P.S.


JOHN D. MUNDING
WSBA #21734

ELSAESSER JARZABEK ANDERSON
MARKS ELLIOTT & MCHUGH


FORD ELSAESSER
BARRY MCHUGH

Attorneys for Defendant Parishes

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